

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

AMERICAN FEDERATION OF TEACHERS,
et al.,

Plaintiffs

vs.

SCOTT BESSENT in his Official
Capacity as Secretary of the
Treasury, et al.,

Defendants.

CIVIL NO.:
8:25-cv-00430-DLB

Greenbelt, Maryland
February 26, 2025

TRANSCRIPT OF PROCEEDINGS
STATUS CONFERENCE
BEFORE THE HONORABLE DEBORAH L. BOARDMAN
Via Teleconference

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P R O C E E D I N G S

(11:44 a.m.)

THE CLERK: The matter now pending before this Court is Civil Action Number DLB-25-0430, American Federation of Teachers, et al. versus Scott Bessent, et al. We are here today for the purpose of a status conference.

Counsel, please identify yourselves for the record.

MS. HU: Good morning, Your Honor. My name is Xiaonan April Hu on behalf of the plaintiff. I'm joined here today with John Schwab, Carson Scott, Laurence Schwartzto1 and Mark Hanna.

THE COURT: All right. Counsel for defendants.

MS. HALL: Good morning, Your Honor. This is Emily Hall at Department of Justice on behalf of defendants. I'm joined by Elizabeth Shapiro and Ariana Arnold, also both of the Department of Justice.

THE COURT: All right, counsel. Thank you very much for getting on the line. First off, I want to apologize sincerely on behalf of the court for the delay in getting started. We had some technical difficulties and I wanted to ensure that we have a public access line. It's my understanding that the public has been granted -- the public that has called into the public access line has been granted -- or is on the line. I just want to make sure if you are not a lawyer appearing in this case that your phone is on mute, but

1 of course the public is welcome.

2 Okay. So in the 45-minute delay, were you able to settle
3 the case, counsel?

4 MS. HU: I wish we could say that we did but no such
5 luck.

6 THE COURT: All right. Okay, all right. Thank you
7 very much for your joint status report. Just a few things
8 regarding scheduling, I think the proposed schedule that you've
9 offered is completely reasonable, so thank you very much for
10 getting together on that. Unfortunately, it doesn't work for
11 me.

12 I'm available for a hearing in this matter on a
13 preliminary injunction motion on March 17 or March 31 and
14 later. The period in between those two dates, the Court is
15 unavailable, so there's that. Before we get to actually when
16 we'll do the hearing, let me ask you this. I noted that in the
17 New York case, State of New York versus Trump before Judge
18 Vargas, the Court there turned the TRO into a preliminary
19 injunction without any production of the administrative record,
20 without any discovery or evidence at a hearing.

21 So with that in mind, help me understand why this case is
22 different. Let me start with you, Ms. Hall. Is there an
23 administrative record to be produced?

24 MS. HALL: Your Honor, can you hear me? I'm sorry, I
25 just want to make sure --

1 **THE COURT:** I can hear you.

2 **MS. HALL:** Thank you, Your Honor. Your Honor, I
3 think that this case is somewhat different in that we are
4 willing and able to produce an administrative record, as we
5 indicated in the joint status report, but we do believe this
6 case could be decided by Your Honor turning the TRO into a
7 preliminary injunction and entering that at this time based on
8 the current record.

9 **THE COURT:** Oh, so we could -- so full stop, I could
10 just enter an order turning the TRO into a preliminary
11 injunction without additional briefing or hearing? Is that
12 what I heard?

13 **MS. HALL:** Yes, Your Honor.

14 **THE COURT:** All right. Ms. Hu, any opposition to
15 that?

16 **MS. HU:** Yes, Your Honor. I think plaintiffs would
17 oppose converting the TRO into a PI, in part because we
18 understand defendants' arguments have consistently been that
19 there is insufficient evidence to support a conclusion or
20 finding that plaintiffs have shown a likelihood of success on
21 the merits that there has been an agency action that violates
22 the Privacy Act; and so we are concerned that if the TRO gets
23 converted to a PI such that we are unable to obtain the
24 administrative record or any evidence, the Government will then
25 on appeal assert that there was insufficient evidence which

1 would, we think, really be unfair because we would have been
2 deprived the ability to access that evidence.

3 I would also, Your Honor, note that one important
4 distinction between our case and the SDNY case is the basis for
5 the Court's decision, so in the SDNY action, the Court
6 determined that the agency's decision to grant access or the
7 Treasury's decision to grant access was arbitrary and
8 capricious. It did not address the merits of whether the
9 access fit into the need-to-know exception. And so I do think
10 that puts us in a slightly different position, and the SDNY
11 court did order a limited production in the form of, I believe,
12 a joint status report to be delivered on March 24th. So there
13 is going to be some amount of information that is tendered to
14 the court in that action.

15 Here, of course, because defendants have invoked the
16 need-to-know exception and have represented to us that there
17 will be an administrative record, we think the factual nature
18 of that inquiry would counsel in favor of obtaining that record
19 and then having an evidentiary hearing exception with the
20 preliminary injunction hearing.

21 **THE COURT:** So, Ms. Hall, you touched on this issue
22 at the hearing last week and ultimately the Government said
23 that it would continue to argue before the Fourth Circuit if
24 you appeal that there was an insufficient evidentiary record,
25 and for that reason, you did not want to turn the TRO into a

1 PI. Has that position changed? In other words, if we convert
2 this into a preliminary injunction, will you maintain on appeal
3 that there's an insufficient evidentiary record for the
4 preliminary injunction?

5 MS. HALL: Your Honor, if the Court were to convert
6 the TRO into a PI, we would maintain, I think, several
7 arguments; one of which is that the plaintiffs have not shown
8 on the current record that they're entitled to a PI. As we
9 said in our submission to the Court the day of the hearing last
10 week, we are not willing to affirmatively waive arguments on
11 appeal at this time.

12 THE COURT: I understand that, but you've just asked
13 me to convert the TRO into a PI and in doing that, you are then
14 saying you don't want to produce documents, "We want you to
15 turn it into a PI, but yet we are going to argue to the Court
16 of Appeals that there was no factual record."

17 Or are you saying, "We won't be arguing the absence of a
18 factual record; we will be arguing" -- for example -- "Judge
19 Boardman, you made a mistake, there's no standing"? Or, "Judge
20 Boardman, you made a mistake, there's no final agency action"?

21 Will you be making legal arguments, or will you be
22 claiming that the plaintiffs failed to meet their burden with
23 respect to the factual record?

24 MS. HALL: Your Honor, my understanding is that on
25 appeal, we might make both types of argument. I think there

1 are arguments that we made in our TRO opposition that are
2 purely legal arguments, but there may also be arguments that,
3 for example -- as far as I know, there's been no discussion of
4 plaintiffs providing more evidence or discovery from
5 plaintiffs' perspective, and so in that respect we might argue
6 that the plaintiffs have not produced evidence, for example, of
7 irreparable harm.

8 **THE COURT:** Okay. Well, I don't think I can convert
9 this to a PI based on the representations of the Government. I
10 just don't think that would -- I think that would be wrong
11 actually. I think that would be unfair to the plaintiffs, and
12 I think that might be -- I think that would be a problem.

13 So let's proceed as the parties had proposed in their
14 joint status report. So back to my question, Ms. Hall: Is
15 there an administrative record to be produced? It looks like
16 there is but I just want to know for sure.

17 **MS. HALL:** Yes, Your Honor. We are prepared to
18 produce an administrative record in this case by next Friday,
19 March 7.

20 **THE COURT:** Okay. From both agencies, right?

21 **MS. HALL:** Yes. Your Honor, we discussed yesterday
22 in our meet and confer whether the Court anticipated the
23 administrative record to involve Treasury and we anticipated
24 that it might, but we were not certain what the scope of Your
25 Honor's order was.

1 **THE COURT:** Right now the TRO is with respect to two
2 agencies but if there's a PI that's filed, it's possible it
3 could be filed against all three. So what's the
4 plaintiffs' position on this?

5 **MS. HU:** Your Honor, our position is that we would
6 file a PI seeking to enjoin all three agencies, in part,
7 because of the different nature of the SDNY action and the
8 basis on which that action was decided.

9 **THE COURT:** Okay. So you'll produce the
10 administrative record with respect to all three agencies by
11 next Friday. Is that right, Ms. Hall?

12 **MS. HALL:** That's right, Your Honor.

13 **THE COURT:** All right, okay. Now let's circle back
14 to where we started which is I've got available March 17 and
15 March 31st or thereafter. If we do March 31, we would need the
16 Government's consent to extend the TRO past the 28 days.

17 Ms. Hall, what is your position?

18 **MS. HALL:** Your Honor, we oppose extending the TRO
19 and we would be willing to prepare to hold the PI hearing on
20 March 17.

21 **THE COURT:** Okay. Are you willing to produce the
22 administrative records sooner than?

23 **MS. HALL:** Your Honor, in conferring with -- excuse
24 me?

25 **THE COURT:** That might be the consequence, which is

1 fine. Go ahead, your concern?

2 MS. HALL: Your Honor, producing an administrative
3 record in this case is going to be a substantial undertaking
4 particularly to prepare all of these documents and produce them
5 to the Court. In order to meet an earlier deadline, I'm not
6 sure that our clients will be able to do that.

7 THE COURT: Okay. I'm not at all trying to pressure
8 you into extending by a week, but I would just like to know
9 why.

10 MS. HALL: Your Honor, there are -- as you know,
11 there are three different agencies involved and it's several
12 agency actions, as you identified in your order, regarding
13 decisions to grant access to agency record systems. So
14 compiling those, all of the documents that the agency
15 considered in making those decisions when, as the Government
16 argued at the TRO, this is not -- we did not internally
17 consider this to be final agency action, although we recognize
18 that Your Honor found differently in her order.

19 Because of that, there are substantial efforts that need
20 to be made in order to just figure out exactly where the
21 relevant documents are in the system, then to compile those
22 into an administrative record, and to ensure that only
23 materials that can be properly included in that record are
24 included.

25 Your Honor, to the extent this may help, we certainly can

1 try, as we mentioned in the joint status report, to produce the
2 administrative record as quickly as possible, and we think it's
3 possible that we could move that timeline up by a day or two,
4 but we are trying to move as quickly as possible, and I'm not
5 in a position to commit to getting that done quicker. But we
6 would be willing to consolidate the briefing schedule into
7 something faster to ensure that Your Honor's March 17th
8 availability would work.

9 THE COURT: Okay. I think perhaps I might have not
10 been clear in my question, but I appreciate that information on
11 how you're compiling the administrative record.

12 What my question was is I can't -- and I'm not --
13 pressuring you to consent to an additional week extension of
14 the TRO so we could have the hearing on the 31st of March. You
15 told me you were unwilling to do that. I'm asking you why.
16 Why can't we extend the TRO until March 31st?

17 MS. HALL: Oh, I'm sorry, Your Honor. I
18 misunderstood your question.

19 THE COURT: I might have not asked it correctly.
20 We're on the same page now.

21 MS. HALL: Got it, thank you, Your Honor. We oppose
22 extending the TRO because the Government's interests are being
23 harmed during the duration and pendency of the TRO. Our
24 employees who are subject to the TRO by its terms are unable to
25 complete the functions of their jobs as they can't access the

1 relevant systems and perform all of the tasks that they are
2 endeavoring to do under their detail assignments and particular
3 job responsibilities at the Education Department and OPM.

4 **THE COURT:** Okay. So the Government does not consent
5 to an extension, certainly its prerogative. Without consent, I
6 can't extend the time frame and that's fine.

7 So now let's talk about a schedule. I think we need to
8 move the deadline for the motion... we could have the -- why
9 don't I do this. Let me punt to you. Ms. Hu, what do you
10 suggest? What's a briefing schedule that you suggest? And
11 I'll have you respond, Ms. Hall.

12 In order to prepare for this, I need this motion fully
13 ripe by the end of the day March 14th.

14 **MS. HU:** Your Honor, I think we could -- looking at
15 the constraints here -- if defendants can produce the
16 administrative record by March 7 at 5:00 p.m., we could put in
17 a brief on, I believe, the 10th, and then they could have until
18 the 13th for their opposition, and then we would put in our
19 reply on the 14th by 5:00 p.m.

20 That being said, Your Honor, we do have serious concerns,
21 given the lack of information from defendants about what
22 exactly the administrative record will encompass, that the
23 schedule leaves us no time to resolve any disputes that arise
24 from any incomplete administrative record that is tendered to
25 us on the 7th. We don't want to be in a position where

1 defendants come to us on the 7th, they've produced 20 sheets of
2 paper, it doesn't answer basic questions similar to the ones
3 that Your Honor proposed at the TRO hearing; and then we're
4 left scrambling to request relief from the Court ordering the
5 production of critical documents that would ensure there could
6 be meaningful judicial review under the APA.

7 **THE COURT:** A couple things. Are you saying that the
8 Government may not be able to produce the entire administrative
9 record by March 7th? Or are you saying you might not be
10 satisfied with the administrative record and try to seek
11 additional discovery which, as you know, is a challenge for
12 you. The bar is high to get discovery in a APA case. So which
13 of those two are you saying?

14 **MS. HU:** I believe what we're saying here is the
15 latter, Your Honor. I recognize the bar is high but we have
16 also not received any clarity into what the administrative
17 record will contain, including basic facts such as who the DOGE
18 affiliates are, what kinds of systems they were granted access
19 to, what their official duties are, what their responsibilities
20 are, and what they have used their access for. So we view
21 those -- of course, the exceptions to the rule against extra
22 record evidence is if the record is incomplete or if it is
23 impossible or difficult for the Court to render meaningful
24 judicial review, and we think an administrative record that
25 lacks documents that speak to those critical questions would be

1 manifestly incomplete and would not facilitate meaningful
2 judicial review under the circumstances.

3 **THE COURT:** Okay. Ms. Hall, do you care to be heard
4 on this particular issue?

5 **MS. HALL:** Your Honor, I think on this point, we
6 would still favor the -- on the first point that Ms. Hu raised,
7 we would be fine with the schedule of briefing on the 10th, the
8 13th and 14th in order to have a March 17th hearing. That
9 schedule is acceptable to the Government.

10 As to the discovery issue, plaintiffs could argue about
11 the incompleteness of the administrative record in their merits
12 section of the preliminary injunction brief. If they think
13 that the record that we have provided to sustain the agency's
14 decision is insufficient, that's the core of APA review. So if
15 they believe that we have provided an insufficient basis for
16 the agency action, that would be a reason to grant the
17 preliminary injunction and enjoin the agency action.

18 **THE COURT:** Ms. Hu.

19 **MS. HU:** Your Honor, I think our concern here is that
20 we understand defendant's position to be they will assemble an
21 administrative record ex post facto where they get to decide
22 effectively what they want to give us. But courts have been
23 clear that an agency "may not unilaterally determine what
24 constitutes the administrative record." I can certainly
25 provide the Court with citations for that.

1 But we are concerned here that the compressed schedule
2 means effectively whatever they give us is whatever they
3 unilaterally determine to give us and we will have no ability
4 to challenge that determination which would be contra the rules
5 and standards for APA actions requiring a record that can
6 ensure meaningful judicial review here.

7 THE COURT: Okay. We're going to go with the
8 briefing schedule that you proposed. So the administrative
9 record will be produced by the Government to the plaintiffs by
10 March 7 at 5:00 p.m.; preliminary injunction motion will be due
11 by March 10 at 5:00 p.m.; Government's opposition March 13th at
12 5:00 p.m.; and any reply by March 14th at 5:00 p.m.

13 If upon production of the administrative record, the
14 plaintiffs believe that they are entitled under the law to
15 additional information, they need to notify the Court by
16 midnight Saturday, March 8th. The Government needs to respond
17 by midnight, Sunday, March 9th, and I will do my very best to
18 address it on -- I'll give myself about 48 hours to deal with
19 it.

20 The plaintiffs' motion is still due. They can supplement
21 their position in the reply brief if any additional discovery
22 is produced. So that's where we're at.

23 MS. HU: Understood, Your Honor. Thank you.

24 MS. HALL: Thank you, Your Honor.

25 THE COURT: All right. Are the deadlines clear? In

1 other words, March 8th is a Saturday. Midnight that night,
2 Saturday night it's due. Government then will get 24 hours so
3 that I can review these papers first thing Monday morning. All
4 right?

5 MS. HALL: Yes, Your Honor.

6 THE COURT: Okay.

7 MS. HU: Yes, Your Honor.

8 THE COURT: The time on the 17th... Let's start it
9 at 10:30, same courtroom. I'll give you extra bonus points if
10 anybody shows up with a green suit. All right, these jokes are
11 falling flat.

12 Is there anything else from the plaintiffs' perspective?

13 MS. HU: Your Honor, may I ask a quick clarifying
14 question for the hearing on the 17th? Does Your Honor
15 anticipate that we may be able to present or call witnesses at
16 this hearing? In other words, will it be an evidentiary
17 hearing, or is the Court reserving a decision on that pending
18 the production of the administrative record?

19 THE COURT: So it's your burden. If you believe that
20 you need evidence, you should identify that ahead of time
21 and allow the Government to respond as to whether that's
22 appropriate. I think that should come out in the briefing.

23 MS. HU: To clarify, Your Honor, would that be the
24 briefing that would be filed on the 8th before midnight? So
25 any request for additional discovery plaintiffs believe they're

1 entitled to, as well as any witnesses they feel they're
2 entitled to call based on the administrative record?

3 **THE COURT:** Ms. Hu, that seems fine. It's hard for
4 me to tell you exactly where it should be -- come in. I just
5 need it communicated to me ahead of time so that I'm able to
6 make a decision. The Government needs to be on notice as soon
7 as possible. So if you think it makes sense to identify why
8 you need this information and why you need to have
9 evidentiary -- testimony at the evidentiary hearing, then you
10 can bring it up in your March 8th filing. I'm letting you also
11 bring it up in your motion papers. That's up to you.

12 I just need you to communicate effectively and early to me
13 about the issues so that I can make a decision. That's the
14 best guidance I can give you right now. Does that make sense?

15 **MS. HU:** That makes sense, Your Honor. I appreciate
16 that clarification.

17 **THE COURT:** Yeah, I don't know how much of a
18 clarification it was. All right.

19 Ms. Hall, anything to add from your perspective?

20 **MS. HALL:** Nothing further from the Government, Your
21 Honor.

22 **THE COURT:** Okay. We'll issue a paperless order
23 memorializing the deadlines, and I will see you on March 17th.
24 Thank you very much.

25 **MS. HALL:** Thank you, Your Honor.

1 MS. HU: Thank you, Your Honor.
2 (Proceedings concluded at 12:08 p.m.)
3
4

5 CERTIFICATE OF OFFICIAL REPORTER
6

7 I, Patricia G. Mitchell, RMR, CRR, do hereby certify
8 that the foregoing is a correct transcript of the
9 audio-recorded proceedings in the above-entitled matter, audio
10 recorded via FTR Gold on February 26, 2025, and transcribed
11 from the audio recording to the best of my ability and that
12 said transcript has been compared with the audio recording.

13 Dated this 3rd day of March 2024.
14

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17 Patricia G. Mitchell
18 Official Court Reporter
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